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No.

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IN THE

# Supreme Court of the United States

October Term, 1982

PAUL A. LANIGAN,

*Petitioner*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a conviction which is based on inferences specifically negated by the facts of record is constitutionally infirm?

2. Where a scheme to defraud is unsuccessful, must not a mailing be related to the scheme itself in order to provide jurisdiction for a mail fraud prosecution?

3. Where the mailing is a serendipitous choice of persons having no contact with a schemer, is not the mailing so far removed from the scheme as to be insufficient to establish mail fraud jurisdiction?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner above named respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in this case on November 18, 1982, Petition for Rehearing denied, December 21, 1982.

## OPINIONS BELOW

There is no Opinion of the panel of the United States Court of Appeals for the Third Circuit affirming the Opinion of the United States District Court for the Eastern District of Pennsylvania. The Judgment Order affirming the Opinion without discussion, entered November 18, 1982, is printed in the Appendix at A1.

The Order of the Third Circuit Court of Appeals denying the Petition for Rehearing and Rehearing En Banc, dated December 21, 1982, is printed in the Appendix at A3.

The Opinion of the United States District Court for the Eastern District of Pennsylvania, affirmed by Judgment Order of a panel of the Third Circuit, is reported at 534 F. Supp. 630 (E. D. Pa. 1982). A copy of this Opinion is printed in the Appendix at A5.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit, printed in the Appendix at A1, was entered on November 18, 1982. On December 21, 1982, the Court denied a Petition for Rehearing and Rehearing En Banc filed by Petitioner herein. A3. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### United States Constitution, Amendment V

No person shall . . . be deprived of life, liberty, or property without due process of law; . . .

### 18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both.

## STATEMENT OF THE CASE

Moyer's Landfill was a waste and trash disposal site located in Lower Providence Township, Montgomery County, Pennsylvania. Since World War II, Moyer's had accepted wastes and trash from private companies and municipalities, having been owned and operated by Howard Moyer, and his father before him.

In early 1974, Howard Moyer sold the landfill operation to a corporation, Moyer's Landfill, Inc. (hereinafter "Moyer's"). Howard Moyer, Lou Mandrachia, Gerald Thorpe and Petitioner, Paul A. Lanigan, each owned an equal interest in Moyer's, the land beneath the landfill being retained by Howard Moyer.

Beginning in October of 1974, Moyer abandoned the day-to-day operation of the landfill to Gerald Thorpe and Petitioner. Mr. Mandrachia was never actively involved in the business.

Plymouth Township, also located in Montgomery County, was a municipality in need of landfill sites in which its wastes and trash could be disposed. In early 1974, the township had three alternative landfill sites available to it: (1) Tri-County Hauling, which charged approximately $42.00 per load; (2) Montgomery County Landfill, which charged approximately $38.00 per load; and (3) Moyer's which charged $25.00 per load. All these charges were based on published rates, which all customers, be they corporate, municipal, or private, were uniformly charged. Tri-County shut down in March of 1974, leaving only Moyer's and Montgomery County as alternative disposal sites available to the township.

Wilbur Sibley (hereinafter "Sibley"), a Deputy Health Officer for Plymouth Township, was responsible for the disposal of the township's municipal wastes. After Tri-County closed, Sibley undertook an economic feasibil-

ity study in order to determine which landfill would be most economical for the township to use. In addition to price per load, Sibley considered and evaluated the following factors: (a) travel time to and from the landfills; (b) turn around time at the landfills; (c) wear and tear on township garbage trucks; (d) traffic congestion on access roads to the landfills; and (e) hours of operation. After contacting Gerald Thorpe and Petitioner in December of 1974 to obtain confirmation of Moyer's published rate charges, Sibley completed his economic feasibility study, and concluded that Moyer's was by far the cheapest and best landfill for the disposal of the township's wastes. Indeed, by using Moyer's, the township saved $15,000 to $17,000 per year, a sum approaching forty (40%) percent of the yearly Moyer's charges.

Sibley also had the responsibility of verifying that invoices submitted by landfills were true and correct, and that the invoices represented loads of trash actually disposed of at each landfill. On receipt of each month's invoice, Sibley checked the figures against receipts township drivers contemporaneously obtained on dropping off their loads. After concluding that the invoices contained valid charges, Sibley prepared a voucher or warrant for submission to the township officer manager.

On receipt of the voucher, the office manager typed up a list of bills to be paid, which list was submitted to the township council, the sole body with the power to authorize payment. Since the township council met only on the second Monday of each month, its procedures required that invoices for previous month's services be submitted by the Wednesday preceding the second Monday of each month. Thus, Moyer's could not be timely paid for services provided in the previous month unless Sibley promptly verified Moyer's timely submitted invoice and presented his voucher to the office manager. The timing

of the township's payment to Moyer's was subject to the whim and caprice of Sibley.

Sibley's failure to timely review Moyer's invoices was more than a theoretical problem. The record discloses that for the two (2) months in the year 1974 during which Plymouth Township disposed of wastes at Moyer's, the payment of monies due and owing Moyer's was delayed despite the timely submission of invoices. In connection with loads deposited in January of 1974, the Moyer's invoice was submitted on the 6th day of February, the Wednesday before the second Monday, but the bill was not paid by the township until the 25th of February, the fourth Monday of the month. Similarly, in connection with wastes dumped in May of 1974, Moyer's submitted its invoice on June 3, the first Monday of the month, but was not paid until July 8, five (5) weeks later. Thus, prior to Sibley's completion of his economic feasibility study determining that Moyer's was the cheapest and best dumpsite for the township, Moyer's had experienced substantial difficulties in timely obtaining monies due it for services performed.

In December of 1974, Sibley contacted Gerald Thorpe and Petitioner for the purpose of accumulating data necessary to complete his economic feasibility study. Subsequently, Sibley met with Thorpe and Petitioner and began to send Plymouth Township's wastes to Moyer's on a regular basis. Sibley testified, without contradiction, that his decision to use Moyer's was based solely upon the substantial savings inuring to the township's benefit. The price charged Plymouth Township for the deposit of wastes at Moyer's was the same as Moyer's published price, and the same price Moyer's charged all customers. That same uniform pricing policy continued throughout the time frame covered by the indictment. Moreover, Sibley testified that the only reason why the township con-

tinued to deposit wastes at Moyer's was because the cost of using Moyer's was continuously less than that of Montgomery County so that the township realized substantial monthly savings.[1]

Thus, the record discloses that prior to Sibley's determination that Moyer's was the best alternative for disposal of the township's wastes, Moyer's had experienced substantial difficulties in obtaining monies due it for services performed.[2] With the township utilizing Moyer's extensively beginning in January of 1975, there was a substantial question whether those difficulties would continue.

In connection with the January 1975 invoice, submitted on February 3, the first Monday of the month, the township paid Moyer's on February 10, the second Monday of the month. In delivering the January invoice,[3] Thorpe gave no monies whatsoever to Sibley, nor was there any discussion about monies being paid to Sibley. This marked the first time in the history of dealings between Moyer's and the township that Moyer's ever was

1. The record reveals that Montgomery County Landfill's price per load increased from $38.00 per load in 1975 to $41.00 per load in 1976, to $42.00 per load in 1977, to $43.00 per load in 1978, to $46.00 per load in 1979, and to $52.00 in 1980. During the same period of time, Moyer's charges increased from $25.00 per load in 1975 to $30.00 per load in 1976, to $35.00 per load in September of 1980. Not until March of 1981, when Moyer's Landfill (by that time being operated by Howard Moyer) increased its price to that charged by Montgomery County, did Plymouth Township begin using both landfill operations equally.

2. The record is uncontradicted that each of the invoices submitted were for actual services performed. There was no suggestion or implication that the bills were padded, altered, or modified.

3. All invoices, including those that contained tips for Sibley, were hand delivered. The mail fraud nexus claimed was restricted to the township's unilateral decision to mail its remittance checks to Moyer's.

timely paid on the second Monday of the month, in accordance with the township's procedures.

In connection with the invoice submitted March 1 for fees charged the township for February 1975 landfill use, Thorpe presented an envelope to Sibley which contained the invoice and $100. The record reflects that when Sibley called Thorpe on discovering the $100 submitted with the invoice, Thorpe "said it was just a token of our appreciation".[4] The February invoice, submitted March 1, was paid March 10, the second Monday of the month.

In connection with services performed in the month of March 1975, Thorpe submitted an invoice to Sibley on April 1. The envelope contained no money. The March bill was paid on April 10, four (4) days *earlier* than the second Monday of the month.

In connection with the services performed in April 1975, Thorpe delivered an invoice to Sibley on May 1, in an envelope which contained $200 in cash. This money was given the month following the township's payment to Moyer's which issued four days ahead of the time established by township procedures. When Sibley called Thorpe in connection with the $200, Thorpe said "they wanted Plymouth Township on their books as a customer."

4. At the bench trial, Judge Broderick found that Thorpe told Sibley "that the cash payment was a token of their appreciation for his having sent trash to Moyer's Landfill." *United States v. Lanigan*, 534 F. Supp. 630, 633 (E. D. Pa. 1982). In point of fact, the record reflects that no such statement was made. Moreover, given the history of Plymouth Township's slow payments to Moyer's and the fact that Sibley chose Moyer's on objective criteria long before any money changed hands, the only sensible conclusion is that Sibley received money because he processed Moyer's invoice in a timely manner, as he was supposed to do. As is set forth *infra*, this type of fact creation by the district court led to Petitioner's wrongful convictions.

The April 1975 invoice submitted in May was paid May 12, the second Monday of the month.

In connection with services performed in May 1975, Thorpe submitted an invoice to Sibley on June 2. The envelope contained no monies whatsoever. That invoice was paid on June 9, the second Monday of the month. Sibley testified that he received a call from Thorpe in June during which Thorpe said "do you want Plymouth Township to continue dumping at Moyer's Landfill?" and "they wanted to keep them on their books as customers".[5] In connection with the deposit of wastes in June 1975, an invoice was delivered to Sibley by Thorpe on July 1, which invoice was in an envelope containing $200. That invoice was paid on July 14, the second Monday of the month.

Therefore, the record is clear that the only times when Sibley specifically recalled receiving tips submitted with invoices were those months following the months in which the township adhered to its payment schedule, by issuing the check for services rendered either on or before the second Monday of the month.

Subsequently, and through the end of 1980, tips came to Sibley in three (3) of four (4) hand delivered envelopes containing monthly invoices. Sibley, testifying pursuant

5. Taken out of context, Thorpe's May and June statements to Sibley are susceptible of two meanings: (1) Moyer's wants Plymouth Township as a customer, but only so long as the township timely pays Moyer's for services performed; or (2) Moyer's wants Plymouth Township as a customer, and the money is to assure that Sibley does not change Plymouth's dumpsite. Given the past history of township delayed payments, the economic feasibility study resulting in the choice of Moyer's long before any tips went to Sibley, the continuing adherence of each landfill to its published rates for all customers, and the 40% savings benefit to Plymouth from using Moyer's, it is likely that the former meaning adheres. In any event, given two reasonable interpretations, the latter cannot be seized by a trial court to establish guilt beyond a reasonable doubt. Nonetheless, the district court did just that in this case.

to a plea agreement with the United States, stated repeatedly and unequivocally that (a) the monies received in no way influenced any of his decisions or actions; (b) he honestly and faithfully carried out his job, always acting in the township's best interest; (c) Moyer's was always the most economical location at which the township could dispose of its municipal wastes; (d) the decision to use Moyer's was made prior to his receipt of any money; (e) the money had no effect whatsoever on his decision to use or continue to use Moyer's; (f) with or without the money, he would not have done anything different in connection with the disposal of township wastes and/or Moyer's Landfill; and (g) neither Thorpe nor Petitioner ever asked him to do or to refrain from doing anything.

Sibley further testified that Plymouth Township was not defrauded. In fact, Sibley stated that he had entered a guilty plea to a mail fraud charge based on his receipt of monies from Thorpe and Petitioner *solely* because he believed that taking money was wrong. Sibley did not in any way believe that he was participating in a scheme to defraud the township, that the township was defrauded, or that anyone ever attempted to defraud the township.

After a two (2) day bench trial in which Sibley was the sole witness testifying about dealings with Moyer's and Petitioner, Petitioner Lanigan and Gerald Thorpe were convicted of five (5) counts and four (4) counts of mail fraud, respectively. A5. On November 18, 1982, a panel of the Third Circuit issued a Judgment and Order affirming the trial court, without opinion. A2. Prior to the issuance of the mandate, Petitioner filed a Petition for Rehearing and Rehearing En Banc, which petition was denied by the Court on December 21, 1982. A1. The Court granted Petitioner's application for a Stay of Issuance of Mandate, pending the filing of the within Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

This Court has consistently recognized that it is fundamentally unfair to condemn an individual and stigmatize him as a criminal "when there is reasonable doubt about his guilt". Thus, before an individual may be branded as guilty and deprived of his liberty, the government is constitutionally required to prove guilt beyond a reasonable doubt. This due process command serves two distinct jurisprudential purposes in our democratic society. As articulated by this Court in *In re Winship*, 397 U. S. 358 (1970):

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence . . . Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

*In re Winship, supra*, at 363-364.

Petitioner's convictions rest on assumed facts contradicted by the record, which have resulted in the condemnation of an innocent man and violate the most basic tenets of due process. Indeed, the evidence actually pre-

sented does not establish an offense cognizable as a mail fraud.

**A Criminal Conviction Which Is Based on Inferences Specifically Negated by the Facts of Record Is Constitutionally Infirm**

As is manifest from the facts in this case, Petitioner paid monies to Sibley solely to ensure that the township promptly paid Moyer's for services rendered. The timing and history of the township's payments to Moyer's viewed together with the timing of the cash payments to Sibley demonstrate the correctness of that conclusion. Indeed, Sibley was the sole witness testifying about the scheme and his testimony is uncontradicted that: (1) Sibley was not given any monies until months after Moyer's was chosen as the township's primary waste disposal site; (2) Sibley always acted loyally and honestly in performing his duties; and (3) Sibley was given a gratuity only in months that he promptly processed the bills submitted for the prior month's services in accordance with township policy. Presented with this uncontradicted and simple testimony, the District Court had two lawful options available to it. As trier of fact, it could believe or disbelieve all or part of Sibley's testimony.

Instead, the District Court exercised a third, and improper option. In the absence of any record evidence, the court inferred the opposite of Sibley's testimony and found the opposite to be fact. Believing that monies paid to a public official are always insidious, intended to pervert and unavoidably criminal, the court found that the tips to Sibley were a *quid pro quo* to ensure his loyalty to Moyer's and not to the township. This inference of corrupt motive not only finds no predicate support in the evidence, but also is specifically negated by the record.

Because the facts of record specifically and conclusively negate the inferences drawn by the district court, Petitioner's convictions are constitutionally infirm, in contradiction to the requirements of *In re Winship, supra,* and pointed authority within the Third Circuit.

In *United States v. Bycer,* 593 F. 2d 549 (3d Cir. 1979), the Third Circuit reversed convictions for illegal drug distribution because the convictions were improperly premised on a chain of inferences which were not logically drawn from the facts established at trial. In discussing the relationship of inferences to evidence the Third Circuit admonished:

> Inferences from established facts are accepted methods of proof when no direct evidence is available. It is essential, however, that there be a logical and convincing connection between the facts established and the conclusion inferred. We find that correlation lacking in this case where inferences of illegal drug distribution were drawn from a pharmacist's inability to reconcile his inventory of controlled substances with records of shipments to his store. Since there was no other evidence to establish the prosecution's case on distribution, we vacate those convictions.
>
> . . .
>
> This case, however, must be viewed from a slightly different perspective. The government's evidence, resting as it does only upon a chain of inferences, requires us to determine whether the proved facts logically support the inference of distribution.
>
> Our careful review of the record in this case fails to disclose any substantial connection between the proved, non-exclusive possession and the charged distribution. . . . We are not willing to abandon

> the protection designed to aid the innocent—requiring proof beyond a reasonable doubt, not simply suspicion—to sustain a conviction.

*United States v. Bycer, supra* at 550-552.

The same kind of unwarranted suspicions which were wrongfully used to justify *Bycer's* convictions, were applied to Petitioner's detriment. Petitioner was convicted only when the district court assumed the opposite of facts of record. It is hornbook law that where two reasonable inferences may be drawn from a set of facts, guilt beyond a reasonable doubt does not exist. Where the reasonable inference is disregarded, and facts opposite to testimony inferred, there clearly can be no finding of "guilt with utmost certainty". *In re Winship, supra* at 364. *Bycer* represents the sound legal reasoning expected of judicial factfinders and commands respect for the decisions of the judiciary. To countenance the use of the obverse of the *Bycer* logic is to encourage the "risk of convictions resting on factual errors" and to dissipate "the respect and confidence of the community in applications of the criminal law". *In re Winship, supra* at 364.

As this Court recently reiterated:

> The standard of proof beyond a reasonable doubt . . . impress[es] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, [and] the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself . . . the constitutional standard recognized in the *Winship* case . . . presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence

necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

*Jackson v. Virginia*, 443 U. S. 307, 315-316 (1979). A conviction obtained in violation of that standard is constitutionally infirm and may not stand.

**Since the Evidence Established at Most an Unsuccessful Scheme to Defraud, the Mail Fraud Statute Applies Only if the Mailings Were in Furtherance of the Scheme**

Most mail fraud prosecutions arise from successful schemes to defraud. In that connection, the use of mails in furtherance of the scheme is a rather broad concept, because any mailing related not only to the creation and concealment of the scheme, but also to its successful implementation, and mailings engendered thereby, are deemed mailings sufficient to establish federal jurisdiction.

Here the only testimony adduced was that the scheme failed. There is no record evidence on which any other conclusion may be based, much less inferred. Therefore, to establish the requisite jurisdiction, even if one assumes there was a scheme to defraud, the mailing must be related to the creation or concealment of the failed scheme.

The evidence establishes that the sole mailings were the township sending monthly checks to Moyer's for services actually rendered. These checks were unrelated to the scheme to defraud since the scheme, even if it ever existed, was never effectuated. Therefore, there was no mailing related to the scheme to permit the invocation of federal mail fraud jurisdiction.

Just as an overt act cannot prove the existence of a conspiracy, a mailing cannot prove the existence of a

scheme to defraud. Where, as here, no scheme succeeded, and Moyer's obtained Plymouth Township business based on merit, the fact that checks were mailed has no bearing on the failed scheme and, in fact, is irrelevant to that scheme.

Both the Third Circuit and District Court failed to grapple with this issue. Their failure resulted in the convictions here obtained based on a mailing lacking any relationship to a scheme to defraud.

**The Government's Evidence Failed to Establish an Offense Cognizable as a Mail Fraud and the Resulting Convictions Are Therefore Inconsistent With the Decisions of This Court**

The mail fraud charges lodged against Petitioner were both unique and suspect in several crucial respects. First, although admittedly the evidence established that Petitioner paid money to Sibley and that Plymouth Township deposited its municipal wastes at Moyer's, the government never proved any causal relationship between the receipt of monies, Sibley's decision to employ Moyer's and the use of the mails. In fact, Sibley's testimony was directly to the contrary. Second, the corpus of the mail fraud arose solely from Plymouth Township's own unilateral decision to mail checks to Moyer's on five occasions over a six year period. The government never even alleged (1) that monies were mailed to Sibley, (2) that Moyer's bills were mailed to the township, (3) that Petitioner or Sibley used the mails in an attempt to conceal, mislead or cover-up any alleged scheme or (4) that the mails were intended to be used at all. The evidence did, however, unequivocally demonstrate that the township affected substantial cost savings flowing from Sibley's choice of Moyer's as a waste disposal site and that the township always received Sibley's faithful loyal services.

Despite the absence of any suggestion that the township was defrauded of monies, the fact that the sole scheme alleged in the indictment was that Petitioner deprived the township of Sibley's faithful, loyal services, and the lack of any mailing nexus, the district court nonetheless found that a series of mail frauds had occurred.[6] The very obvious deficiencies inherent in the presentation of the government's case demonstrate the want of a cognizable mail fraud and render the resulting convictions inconsistent with prior decisions of this Court.

Mail fraud is a statute of limited jurisdiction reaching only those frauds whose use of the mails is an integral part of the scheme or artifice alleged. As this Court held in *Kann v. United States*, 323 U. S. 88, 95 (1944):

> The federal mail fraud statute does not purport to reach all frauds, but only those instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

Here, even were the evidence sufficient to warrant the inference that the agreement to use Moyer's was itself a scheme, the scheme was completed when the township agreed to use Moyer's. The creation of that scheme preceded, by months, the payment of money to Sibley. If the creation of that scheme were criminal, then the scheme

6. In reaching this result, the district court conjectured that the taxpayers of the township were defrauded since the monies given to Sibley could have been deducted from the bills submitted by Moyer's. A16. This is yet another illustration of the district court engaging in improper factfinding as there was never any evidence or any allegation from which this inference properly could be drawn. On the contrary, the district court surmised that such could have occurred, despite the uncontradicted testimony of a uniform rate policy by Moyer's, and faulted Petitioner for failing to prove otherwise.

was completed when monies were intermittently paid to Sibley for promptly processing Moyer's bills. Neither the effectuation nor the success of that scheme hinged on subsequent payments to Moyer's being made by hand or through the mails. As such, the mails were neither part of nor were they used in furtherance or in execution of any fraudulent scheme. Petitioner cannot be deemed to have knowingly and willfully caused to be delivered by mail the checks for which the township made a unilateral choice as to method of disbursement. Petitioner had no control over this decision and how the township made its payment was immaterial to Petitioner.

This crucial distinction has been consistently drawn by this Court in a series of cases. In *Pereira v. United States*, 347 U. S. 1 (1954), the scheme itself was the obtaining of sums of money from out of state banks, necessarily by mail or wire, and the mailings alleged were essential to the scheme to defraud. This Court held that one "causes" a mailing where "one does an act with the knowledge that the use of the mails will follow in the ordinary course of business". *Pereira v. United States, supra* at 9.

In *Kann* this Court reversed the mail fraud convictions of corporate officers who were charged with setting up a dummy corporation for the purpose of diverting profits. The defendants fraudulently obtained checks payable to themselves and either deposited or cashed those checks at various banks which checks the banks then mailed to the drawee banks for collection. In holding there was no mail fraud violation, this Court reasoned that the scheme was complete on deposit of the checks and that:

> The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any

> consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.

*Kann v. United States, supra* at 94.

Similarly, in *Parr v. United States*, 363 U. S. 370 (1960), this Court reversed the mail fraud convictions of defendants who were charged with obtaining gasoline and other products and services by the unauthorized use of school district credit cards. The oil companies mailed their bills for the goods and services to the school district, which, in turn mailed its remittance checks to the oil companies. Finding this nexus insufficient to support a mail fraud conviction, this Court held that the object of the scheme was complete on the obtaining of the goods and services:

> Here, as in *Kann*, '[t]he scheme in each case reached fruition' when Carrillio and Garza received the goods and services complained of. The persons intended to receive the [goods and services] had received [them] irrevocably. It was immaterial to them, or to any consummation of the scheme, how the [oil company] . . . would collect from the [school district]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.

*Parr v. United States, supra* at 393.

Finally, in *United States v. Maze*, 414 U. S. 395 (1974), this Court affirmed the reversal of a mail fraud conviction arising from defendant's use of stolen credit cards to obtain food and lodging. The mailing alleged was that from the provider of services to the payee. In

finding that the mails were not related to the scheme, this Court admonished:

> Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this, instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice' . . .

*United States v. Maze, supra* at 405.

Petitioner did not cause the mails to be used, and the use of the mails was unrelated to any "purpose of executing [the] scheme or artifice". Indeed, the Third Circuit has acknowledged that (1) mailings which occur before the scheme has begun or after its object has been attained are too attenuated to support a mail fraud prosecution, *United States v. Lebovitz*, 669 F. 2d 894 (3d Cir. 1982); and (2) mailings must be the vehicle for the completion of the scheme or the prevention of its detection to sustain a § 1341 conviction. *United States v. Tarnopol*, 561 F. 2d 460, 471-2 (3d Cir. 1977). Thus, as in *Kann*, *Parr* and *Maze*, the subsequent mailings were immaterial to the scheme and an improper predicate for a violation of the mail fraud statute; however, in *Pereira*, the use of the mails was instrumental to the scheme itself and the scheme therefore fell within the proscription of the mail fraud statute.

Here the alleged scheme did not begin until months after Moyer's gained the township as a customer, long after Sibley's feasibility study proved that Moyer's was the only fiscally responsible choice. Even were the intermittent payments to Sibley part of a scheme to defraud, an implausible explanation which is belied by the record, still even that scheme reached fruition when Sibley was,

on limited occasions, handed monies. That the checks prepared by the township, to remit payment for services actually rendered, were routinely mailed to Moyer's was immaterial to Petitioner or to any consummation of the scheme. The alleged scheme did not depend on the manner of transmittal of township payments and the mailings were an insufficient nexus to support a conviction for mail fraud. Therefore, *a fortiori*, the government's evidence was legally insufficient to establish a cognizable mail fraud offense and the decision below is necessarily inconsistent with the decisions of this Court.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

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*Counsel for Petitioner,*
*Paul A. Laniga*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 82-1316 & 82-1317

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UNITED STATES OF AMERICA

v.

PAUL LANIGAN,
Appellant in No. 82-1316

and

GERALD THORPE,
Appellant in No. 82-1317

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CRIM. NOS. 81-00298-01/02

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Argued October 28, 1982

Before: ADAMS, GARTH, *Circuit Judges*, and GERRY, *District Judge.**

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## JUDGMENT ORDER

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After considering all contentions raised by appellant, namely, that (1) the court below erred by refusing to dismiss the indictment where it was established that the

* Hon. John F. Gerry, United States District Court for the District of New Jersey, sitting by designation.

government knowingly withheld exculpatory evidence from the grand jury; (2) the court below erred by refusing to dismiss the indictment on the ground that the instructions given the grand jurors was inadequate and incomplete; (3) the government's evidence failed to establish an offense cognizable as a mail fraud, (a) where a petty township official acts outside his duties in accepting monies and the township suffers no financial loss, there is no mail fraud; the failure to establish a causal connection between Wilbur Sibley's receipt of monies and the township's choice of Moyer's landfill was fatal, (b) the use of mails was too far removed from the scheme alleged to provide mail fraud jurisdiction, (c) the trial court erred in finding that the payments to Wilbur Sibley, which were made after the inception of the relationship between Plymouth Township and Moyer's landfill, were part of a scheme to defraud, (d) the government's evidence failed to prove a scheme to deceive, mislead or conceal material information; and (4) the court below erred in ruling admissible the testimony of Robert Wendel concerning an alleged prior attempted bribe by one or both defendants, which alleged bribe occurred years before the subject offenses, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT:

/s/ ARLIN M. ADAMS
*Circuit Judge*

ATTEST:

/s/ M. ELIZABETH FERGUSON
*Chief Deputy Clerk*

DATED: November 18, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 82-1316/17

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UNITED STATES OF AMERICA,

*v.*

PAUL A. LANIGAN,
*Appellant in No. 82-1316*

GERALD THORPE,
*Appellant in No. 82-1317*

(Crim. Nos. 81-00298-01/02)

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**SUR PETITION FOR REHEARING EN BANC**

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Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and HIGGINBOTHAM, *Circuit Judges*, and GERRY, *District Judge.**

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

* Hon. John F. Gerry, United States District Court for the District of New Jersey, as to panel rehearing only.

having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ARLIN M. ADAMS
*Circuit Judge*

Dated: December 21, 1982

UNITED STATES DISTRICT COURT,
E. D. PENNSYLVANIA.

Crim. No. 81-298.

UNITED STATES of America

*v.*

Paul LANIGAN, Gerald Thorpe.

March 18, 1982.

## MEMORANDUM *

RAYMOND J. BRODERICK, *District Judge.*

The indictment in this case charged the defendants with causing the mails to be used for the purpose of executing a scheme to defraud in violation of Title 18, Section 1341 of the United States Code. Pursuant to Federal Rule of Criminal Procedure 23(a), the defendants each waived their right to a jury trial.

On March 9 and March 10, 1982, the non-jury trial was held before this Court. The indictment in this case charges defendant Paul Lanigan with five counts of mail fraud in violation of Title 18, Section 1341 of the United States Code and the Court's verdict is that defendant Paul Lanigan is guilty as to Count I, guilty as to Count II, guilty as to Count III, guilty as to Count IV, and guilty as to Count V of the indictment. The indictment in this

* This opinion is a slightly edited version of the bench opinion delivered by the Court on March 18, 1982, when the Court rendered its verdict of guilty on all five counts as to defendant Paul Lanigan and guilty on all four counts as to defendant Gerald Thorpe. Citations were not read aloud when the verdict was delivered but are included in this written opinion. This edited opinion constitutes the Courts's official opinion in this case.

case also charges defendant Gerald Thorpe with four counts of mail fraud in violation of Title 18, Section 1341 of the United States Code and the Court's verdict as to defendant Gerald Thorpe is guilty on Count I, guilty on Count II, guilty on Count III, and guilty on Count IV.

Although at the close of evidence, neither defendant requested the Court to find the facts specially, in view of the legal issues presented in this case, the Court has nevertheless determined to make specific findings of fact and conclusions of law in support of its verdicts of guilty.

On the basis of the evidence presented at trial, the Court finds that the Government proved the following facts beyond a reasonable doubt:

Defendants Paul Lanigan and Gerald Thorpe were engaged in the operation of a waste and trash dump known as Moyer's Landfill. They each owned 25 percent interest in the Landfill during the years 1974 through July 1979, at which time Thorpe disposed of his interest and terminated his connection with the Landfill. Mr. Lanigan, however, continued to operate the Landfill through 1980. From 1974 through July 1979, both Paul Lanigan and Gerald Thorpe were actively involved in the daily operations of Moyer's Landfill, which was located at Moyer Road, Lower Providence Township, Montgomery County, in the Eastern District of Pennsylvania.

From 1974 until the present, Plymouth Township, Montgomery County, Pennsylvania has been and continues to be a political subdivision of the Commonwealth of Pennsylvania. From January 1976 until November 1981, Wilbur Sibley was an employee of Plymouth Township. He was in charge of the Sanitation Department, and in this position was the Township official who supervised the Township employees who collected waste and trash and it was he who made the determination as to where the Township trucks would dump the waste and

trash. Mr. Sibley had absolute discretion to determine which Landfill the Township trucks would use for dumping waste. The dumpsites or Landfills to which the trash was taken submitted bills to Plymouth Township and the amount of bills depended on the volume of trash disposed at the particular Landfill. As the head of the Sanitation Department, Mr. Sibley had the responsibility of checking these bills and submitting them to the Township Council for final approval and payment. The Council of Plymouth Township would approve these bills for payment on the basis of Mr. Sibley's approval and recommendation. At the direction of the Council, checks of the Township were issued in the amount of the approved bills and placed in the United States Mail for delivery to Moyer's Landfill. Defendants Lanigan and Thorpe were well aware that Moyer's Landfill would be paid by these checks sent through the United States Mail. Among the checks which the defendants received from Plymouth Township were:

(a) a check in the amount of $2,400 which was mailed to Moyer's Landfill on or about November 8, 1976;

(b) a check in the amount of $2,910 which was mailed to Moyer's Landfill on or about August 8, 1977;

(c) a check in the amount of $2,820 which was mailed to Moyer's Landfill on or about April 10, 1978;

(d) a check in the amount of $3,103.57 which was mailed to Moyer's Landfill on or about April 9, 1979;

(e) a check in the amount of $3,300 which was mailed to Moyer's Landfill on or about May 14, 1980.

From January 1975 until April 1981, Mr. Sibley directed that the Township's waste be taken either to Moyer's

Landfill or the Montgomery County Landfill. During this period, however, the vast majority of the Township's waste went to Moyer's Landfill. Although Moyer's Landfill was farther away from Plymouth Township than was the Montgomery County Landfill, the charge for dumping at Moyer's was less than the dumping charge at Montgomery.

In December 1974 or January 1975, defendants Paul Lanigan and Gerald Thorpe approached Wilbur Sibley for the purpose of soliciting the business of Plymouth Township for Moyer's Landfill. Prior to this time, Moyer's had received some Plymouth Township business but Lanigan and Thorpe sought to acquire for Moyer's a greater share of the Township's waste disposal business. This meeting took place in Mr. Sibley's office at the Plymouth Township Building.

In January 1975, Mr. Sibley sent 34 loads of waste to Moyer's Landfill and on February 3, 1975, the bill for dumping this waste was received by Mr. Sibley in the United States Mail. The envelope contained only the bill. In February 1975, Mr. Sibley sent 69 loads of waste to Moyer's Landfill and at the end of February or the beginning of March 1975, defendant Gerald Thorpe personally handed Mr. Sibley a sealed envelope which contained the bill for dumping the waste and $100 cash. Mr. Sibley told no one about the cash and he retained the money for approximately two weeks before calling defendant Thorpe and asking him about the cash. Defendant Thorpe told Mr. Sibley that the cash payment was a token of their appreciation for his having sent trash to Moyer's Landfill.

Mr. Sibley continued to send the Township waste to Moyer's during March and April 1975. At or about the end of April or the beginning of May of 1975, defendant Thorpe again hand delivered to Mr. Sibley the bill for April in a sealed envelope, which envelope also con-

tained $200 cash. Mr. Sibley opened the envelope after defendant Thorpe left, and discovered the cash and telephoned Thorpe concerning the $200. Defendant Thorpe told Mr. Sibley that he and defendant Lanigan wanted Plymouth Township as a customer of Moyer's Landfill and that "you, Paul [Lanigan], and me [Thorpe] are the only ones who know" about the cash. Defendant Thorpe also told Sibley that since he had kept the first $100, he should keep the $200 because only "you, Paul and me know about the money". Mr. Sibley continued to send trash to Moyer's Landfill during May and June 1975, but a small amount of Township waste was also sent to the Montgomery County Landfill during this period. In June 1975, defendant Thorpe called Mr. Sibley and said that he and defendant Lanigan wanted the Plymouth Township trash business for Moyer's Landfill and that only Thorpe, Lanigan, and Sibley knew of the cash payments which Sibley had previously received. In July 1975, defendant Thorpe delivered to Mr. Sibley at the Plymouth Township Building a sealed envelope containing a bill from Moyer's Landfill and $200 cash. Mr. Sibley accepted the cash and did not tell anyone about it.

Mr. Sibley continued to send the vast bulk of Plymouth Township's trash to Moyer's Landfill during the remainder of 1975 and through 1980. Trash was sent to Montgomery County Landfill only when weather conditions made it unsafe for the Township trucks to go to Moyer's Landfill. Defendant Thorpe continued to hand deliver the monthly bills of Moyer's Landfill to Sibley at the Plymouth Township Building and, with the exception of every fourth or fifth month, these envelopes contained cash for Mr. Sibley. There was $200 cash in the envelopes during 1975 and most of 1976 and $300 from September 1975 until Sibley stopped receiving payments in 1981. During this period of time, Mr. Sibley received

a total sum of between $11,000 and $13,000 in cash payments from defendants Lanigan and Thorpe. Mr. Sibley never told anyone about his receipt of these cash payments.

Defendant Lanigan and defendant Thorpe made these cash payments to Sibley for the purpose of having Mr. Sibley send Plymouth Township's waste to Moyer's Landfill rather than to the Montgomery County Landfill. During the period from 1975 to August 1979, defendants Lanigan and Thorpe not only operated Moyer's Landfill, but they were also part-owners of the Landfill and the receipt of Plymouth Township's trash increased the gross income of Moyer's Landfill. From August 1979, when defendant Thorpe terminated his association with Moyer's Landfill, until January 1981, when the last cash payment was made to Mr. Sibley, defendant Lanigan, who had become a 50 percent owner of the Landfill, increased the gross income of Moyer's Landfill as a result of Mr. Sibley's decision to continue sending trash to Moyer's Landfill. Furthermore, the defendants, Lanigan and Thorpe, were aware that Mr. Sibley was not reporting their clandestine deliveries of cash to anyone, including the officials of Plymouth Township. Defendants Lanigan and Thorpe knowingly and intentionally devised and carried out a scheme to defraud and, for the purpose of executing the scheme, caused the mails to be used.

Mr. Sibley testified at trial that the receipt of the cash from defendants Lanigan and Thorpe did not influence his decisions to send Plymouth Township's trash to Moyer's Landfill. He testified that he did not think that he was cheating anyone because Moyer's charged less for the dumping of the trash than did the Montgomery County Landfill. The defendants contended that, because Moyer's charged less than Montgomery County Landfill, Mr. Sibley's decision to send trash to Moyer's did not defraud

the Township. According to Mr. Sibley, if all the Plymouth Township trash had been sent to the Montgomery County Landfill during the period in which he received between $11,000 and $13,000 in cash payments, Plymouth Township would have paid an additional $96,000 for dumping trash. Defendants contend that the cash payments to Mr. Sibley were merely gratuities given to him and that the Township was not defrauded. The defendants therefore contend that they did not engage in a scheme to defraud within the meaning of the federal mail fraud statute.

During the period from January 1975 until November 1981, Wilbur H. Sibley, the head of Plymouth Township's Sanitation Department, was an employee of Plymouth Township and was subject to the laws of the Commonwealth of Pennsylvania and the Home Rule Charter of Plymouth Township. The Home Rule Charter of Plymouth Township provides that, as a township employee, Sibley:

> (a) perform the duties of his office with fidelity;
>
> (b) receive compensation for his services as provided by the Township Council, the governing body of Plymouth Township;
>
> (c) was prohibited from accepting anything of value from any person, firm or corporation interested in business dealings with the township;
>
> (d) was prohibited from accepting any gift or other consideration that might tend to influence him in the discharge of his duties; and
>
> (e) was prohibited from accepting any fee or other compensation, other than his salary, for any services performed by him pertaining to his duties as a township employee.

Title 18, Section 4701 of the Pennsylvania Consolidated Statutes prohibits any person from offering, conferring or agreeing to confer any pecuniary benefit to an employee of government for the exercise of discretion as a public servant and from offering, conferring, or agreeing to confer any benefit to an employee of government as consideration for violation of a known legal duty as a public servant.

The essential elements of a violation of the mail fraud statute (18 U.S.C. § 1341) are (1) that the defendants devised, or intended to devise, a scheme or artifice to defraud; or for obtaining money or property by means of false or fraudulent pretenses; and (2) that the defendants for the purpose of executing such scheme or artifice or attempting to so do, caused the mails to be used. *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1975); *United States v. Tarnopol,* 561 F.2d 466 (3d Cir. 1977). In determining whether defendants Lanigan and Thorpe were guilty of the offenses charged, this Court first considered whether the defendants had devised or intended to devise a scheme to defraud. Upon consideration of the relevant evidence presented at trial, the Court found beyond a reasonable doubt that defendants Lanigan and Thorpe both intended to devise and did devise a scheme and artifice to defraud Plymouth Township of the independent judgment and loyal and faithful services of Wilbur Sibley.

The defendants have contended that their payments to Mr. Sibley were mere gratuities or gifts that did not influence Sibley's decision-making in his capacity as head of the Department of Sanitation for Plymouth Township. However, the Court found, beyond a reasonable doubt, that defendants Lanigan and Thorpe did devise a scheme to defraud. Over a five-year period, Mr. Sibley received from the defendants between $11,000 and $13,000 in

regular cash payments which Sibley and the defendants concealed from the Township. The payments to Sibley were not mere gratuities or gifts but regular cash payments in substantial amounts. As found by the Court, defendant Thorpe, in two telephone conversations with Mr. Sibley, emphasized the secret nature of the cash payments by assuring Mr. Sibley that only the three of them knew about the payments. Mr. Sibley was the Township official with absolute discretion as to which Landfill was used by Plymouth Township. He was prohibited by the Township's Home Rule Charter from accepting anything of value from anyone "interested in business dealings with the township." In addition, the Home Rule Charter prohibited Mr. Sibley from accepting any gift or consideration which might influence him in the performance of his duties and also prohibited him from accepting any compensation in addition to his salary for services performed by him as a Township employee. The defendants by making these cash payments to Sibley had in effect placed Sibley on the payroll of Moyer's Landfill. The evidence in this case sustains beyond a reasonable doubt the conclusion that the actions of defendants Lanigan and Thorpe defrauded the Township of the independent judgment which the Township was entitled to receive from Mr. Sibley.

Cases interpreting the federal mail fraud statute have consistently held that a scheme to defraud within the meaning of the statute need not intend to defraud the victim of tangible property interests. An intent to defraud the victim out of intangible interests is sufficient to fall within the prohibition of the statute. *United States v. Mandel*, 591 F.2d 1347, 1360-61 (4th Cir. 1979); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert.*

*denied,* 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974); *United States v. Kelly,* 507 F.Supp. 495, 499-504 (E.D.Pa. 1981); *United States v. Proctor & Gamble,* 47 F.Supp. 676, 678 (D.Mass. 1942). The Court found beyond a reasonable doubt that defendants Lanigan and Thorpe intended to so deprive Plymouth Township of Sibley's independent judgment and loyal, faithful, legal, and uncompromised services and that the defendants in fact accomplished this intent. Courts have consistently held that schemes to deprive an employer of the loyal and faithful services of an employee are schemes to defraud within the meaning of the mail fraud statute. *See United States v. Barta,* 635 F.2d 999, 1006 (2d Cir. 1980, *cert. denied,* 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1980); *United States v. Bohonus,* 628 F.2d 1167 (9th Cir.), *cert. denied,* 447 U.S. 928, 100 S.Ct. 3026, 65 L.Ed. 2d 1122 (1980); *United States v. Reece,* 614 F.2d 1259, 1261 (10th Cir. 1980); *United States v. Bush,* 522 F.2d 641, 646 (7th Cir. 1975), *cert. denied,* 424 U.S. 977, 96 S. Ct. 1484, 47 L.Ed.2d 748 (1976), *reh, denied,* 425 U.S. 986, 96 S.Ct. 2194, 48 L.Ed.2d 811; *United States v. George,* 477 F.2d 508, 512 (7th Cir. 1971), *cert. denied,* 414 U.S. 827, 94 S.Ct. 49, 38 L.Ed.2d 61 (1973).

Defendants' reliance upon the case of *United States v. McNeive,* 536 F.2d 1245 (8th Cir. 1976) is misplaced. In *McNeive,* the Eighth Circuit reversed the mail fraud conviction of a St. Louis plumbing inspector who had received five dollar checks as "tips" enclosed with otherwise valid applications for plumbing permits from an area plumbing contractor. The Eighth Circuit reversed on the ground that the evidence showed that the defendant who was accepting "$5 tips" was performing a non-discretionary duty and there was no evidence of an intent to defraud, which is an essential element of the mail fraud statute. *McNeive* can be distinguished from this case

Because, on the basis of the evidence presented at trial, this Court has found beyond a reasonable doubt that defendants Lanigan and Thorpe intentionally engaged in a scheme to defraud Plymouth Township.

Furthermore, the Eighth Circuit in *McNeive* noted that

> courts have held that a recreant employee can be prosecuted under § 1341 if he breaches his allegiance to his employer by accepting bribes or kickbacks in the course of his employment, since such conduct defrauds the employer of his right to the employee's honest and faithful services. *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976). Similar schemes devised by public officials have been viewed as defrauding state or municipal citizens of the same intangible right. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).

536 F.2d at 1249.

This Court also found beyond a reasonable doubt the payments made by the defendants to Mr. Sibley were payments designed to compromise Sibley's discretion and judgment and to induce Sibley to send all of Plymouth Township's waste to Moyer's Landfill for disposal. As this Court has found beyond a reasonable doubt, defendants Lanigan and Thorpe made these cash payments to Sibley in order to induce him to send more Township business to Moyer's Landfill. The defendants did convey the aforementioned funds to Mr. Sibley on a regular basis and encouraged him to keep the payments secret so that they might compromise his decision-making and induce him to send more business to Moyer's.

The object of this scheme was to obtain more business for Moyer's Landfill. Despite Mr. Sibley's testimony as to the costs and benefits of using Moyer's Landfill in place of Montgomery County Landfill, it cannot be said that Plymouth Township was not harmed by Mr. Sibley's receipt of the money and the Township's use of Moyer's for waste disposal. Even if it is true that Moyer's was the best location for the Township's waste disposal, the Township is entitled to have the undivided loyalty of its public servants. The defendants' scheme successfully deprived the Township of Wilbur Sibley's undivided loyalty. Thus, the Township was defrauded by defendants Lanigan and Thorpe since Lanigan and Thorpe could afford to pay as much as $300 per month to Mr. Sibley for the purpose of making certain that Plymouth Township's trash was dumped at Moyer's Landfill and no reason was presented as to why the taxpayers of Plymouth Township could not have been charged a lower price for the dumping of trash at Moyer's Landfill. Thus, the taxpayers themselves were defrauded.

The Court having found beyond a reasonable doubt that the defendants made the payments to Sibley to obtain the Township's business, the perception of Mr. Sibley that he was not defrauding his employer does not negate nor affect the fraudulent intent of the defendants. *See United States v. Bohonus,* 628 F.2d 1167, 1172 (9th Cir.), *cert. denied,* 447 U.S. 928, 100 S.Ct. 3026, 65 L.Ed.2d 1123 (1980). Furthermore, a loyal and faithful government employee would not only have reported to his employer the delivery of cash payments to him by Lanigan and Thorpe, but would have also made a bona fide attempt to have Lanigan and Thorpe reduce the dumping charges which Moyer's Landfill assessed Plymouth Township. As the Seventh Circuit observed in *United States v. Bryza,*

> Although Bryza argues he obtained the best possible contracts for his employer, [his employer] was entitled to negotiate those purchases with the knowledge of its employee's interest. . . . The fraud consisted in Bryza's holding himself out to be a loyal employee, acting in [his employer's] best interests, but actually not giving his honest and faithful services, to [his employer's] real detriment.

522 F.2d at 422 (7th Cir. 1975).

Although this Court has made reference to the fact that the conduct of Mr. Sibley violated Plymouth Township's Charter and that the State's bribery may have been violated by the conduct of defendants Lanigan and Thorpe, there is nevertheless a scheme to defraud in this case regardless of the Charter and the statute. The Supreme Court has long held that the term "scheme or artifice to defraud" is not limited to activities which violate a state law, local law, or which would have been actionable common law fraud. *See Durland v. United States,* 161 U.S. 306, 313-14, 16 S.Ct. 508, 511, 40 L.Ed. 709 (1896). The Fourth Circuit has stated:

> As a result of the failure to limit the term 'scheme or artifice to defraud' to common law definitions of fraud and false pretenses and schemes prohibited by State law, the mail fraud statute generally has been available to prosecute a scheme involving deception that employs the mails in its execution and is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.

*United States v. Mandel,* 591 F.2d 1347, 1361 (4th Cir.) *aff'd* per curiam in relevant part, 602 F.2d 653 (1979)

(en banc), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). *See also United States v. Kelly*, 507 F.Supp. 495, 498 (E.D.Pa.1981). Wilbur Sibley's judgment as a faithful public servant of Plymouth Township was corrupted by the secret monthly payments conveyed to him by defendants Lanigan and Thorpe. The defendants' conduct—their scheme—was contrary to public policy and was clearly in conflict with accepted standards of honest and fairdealing.

Defendants Lanigan and Thorpe have also contended that the use of the mails in this case is "too far removed from the scheme alleged" to constitute mail fraud. As heretofore set forth in the Court's findings of fact, after each bill was approved for payment by Mr. Sibley it was submitted to the Township Council for its authorization to pay the bills. Checks in the amounts of the bills were then mailed to Moyer's Landfill. Defendants Lanigan and Thorpe were aware that the Township would pay the bills submitted by Moyer's by sending checks to Moyer's through the United States Mail.

In *United States v. Lebovitz*, 669 F.2d 894 (1982), the Third Circuit recently restated the law concerning the nexus between a scheme to defraud and use of the mails that is required to constitute a violation of 18 U.S.C. § 1341. Said the Third Circuit:

> The mail fraud statute prohibits the use of the mails 'for the purpose of executing' a scheme to defraud. Whether a mailing is 'for the purpose of executing a scheme' within the meaning of section 1341 depends upon whether it is 'sufficiently closely related to respondent's scheme to bring his conduct within the statute. The completion of the scheme must depend in some way on the mailings charged. However, '[i]t is not necessary that the scheme contemplate the use of the mails as an essential ele-

> ment.' Rather, it is sufficient if the mailing is 'incident to an essential part of the scheme.'

at 898 (citations and footnotes omitted). Thus, a mailing associated with a scheme to defraud will bring that scheme within the reach of the federal mail statute if the completion of the scheme depends in some way on the mailings charged. *See United States v. Adamo*, 534 F.2d 31, 36 (3d Cir.), *cert. denied*, 429 U.S. 841, 97 S.Ct. 116, 50 L.Ed.2d 110(1976); *See also United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1217, 59 L.Ed.2d 456(1979); *United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977).

In this case, the object of the scheme to defraud Plymouth Township was to obtain money for Moyer's Landfill. The checks mailed to Moyer's Landfill by the Township, the checks involved in Counts I through V of the indictment, were the fruits of their scheme. Because the defendants received the proceeds of their scheme through the mail, the mail furthered their scheme. The defendants' scheme was ongoing and was not completed upon the receipt of any of the five checks named in the indictment. In addition, the mailings served another function in the scheme. The mailings, pursuant to usual Township procedure, reinforced the impression, which the defendants had carefully cultivated, that everything concerning the Township's business with Moyer's was without scheme or artifice to defraud. Thus, the use of the mails in this case helped the defendants conceal the fraud perpetrated upon the Township. The concealment was so successful that for more than five years the scheme remained undiscovered. Under these circumstances, it must be found that the mailings involved were a part of the scheme to defraud. *See United States v. Brown*, 583

F.2d 659, 664 (3d Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1217, 59 L.Ed.2d 456 (1979).

The defendants contend that applying the federal mail fraud statute to the facts of this case is an intrusion into an area which should be reserved for local law enforcement. The federal mail fraud statute has consistently been interpreted by the federal courts as prohibiting all schemes to defraud where the use of mail is part of the execution of the scheme, regardless of whether the fraud is a violation of state law or federal law.